No. 83-770

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

THE CITY OF NEW YORK and THE STATE OF NEW YORK,

Appellants,

-against-

THE UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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Pursuant to Rule 16.6 of the Rules of this Court, appellants City of New York and State of New York submit this brief in opposition to the motions to dismiss or affirm submitted by the Solicitor General on behalf of the federal appellees, and by appellees Commonwealth Edison Company, et al.

ARGUMENT

(1)

The federal appellees, and the appellee-intervenor utility companies (intervenors"), urge that appeal does not lie pursuant to 28 U.S.C. §1254(2), which provides for appeal where "a state statute [has been] held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States". In so arguing, they rely on Silkwood v. Kerr-McGee Corp., 52 U.S.L.W. 4043 (Jan. 11, 1984). This Court held in Silkwood that §1254(2) was not applicable where the Court of Appeals invalidated a punitive damages award, but not the state statute permitting such award, on preemption grounds. This Court restated its rule that §1254(2) does not apply to instances where an exercise of authority under state law is invalidated without reference to the state statute. Silkwood v. Kerr-McGee Corp., supra, at 4045-46. In the subject case, however, the appellants' position has been that only a valid federal regulation may preempt the City's ordinance (Section 175.111[] of

the New York City Health Code). App., p. 93a. Furthermore, the Court of Appeals explicitly declared that the Department of Transportation ("DOT") regulation HM-164* preempts the provision of the City's health code. App. p. 40a. Under the circumstances, the Court of Appeals holding is that a state ordinance, not a mere exercise of authority, has been preempted by federal law. As for intervenors' argument that Congress, not the Court of Appeals, has declared the ordinance invalid, such argument can be made in any instance where a state statute is judicially declared invalid as inconsistent with federal law, and must be rejected.

Should this Court determine that an appeal does not lie pursuant to 28 U.S.C. §1254(2), it retains the power to treat our Jurisdictional Statement as a petition for certiorari, as it did in Silkwood. 52 U.S.L.W. at 4046. As we stated in our Jurisdictional Statement, the question presented is substantial.

*HM-164 has been codified at 49 C.F.R. §§171-173,177 (1982).

DOT has issued a regulation, HM-164, permitting shipment by road of all types of radioactive materials, including spent fuel and other large-quantity shipments of radioactive materials, throughout the nation. Despite the possibility of a calamitous nuclear accident within a crowded urban area, and in violation of regulations of the Council on Environmental Quality ("CEQ") binding upon it, DOT failed to prepare an Environmental Impact Statement ("EIS") considering alternate modes of transporting such materials. The issue of the propriety of DOT'S failure to prepare such an EIS does not raise any issues of exhaustion of remedies, as urged by intervenors. Motion to Dismiss or Affirm, pp. 15-16. We submit that, whether or not jurisdiction of this appeal may be predicated upon 28 U.S.C. §1254(2), this Court should reach the merits of the substantial issue raised in this case.

(2)

In their motion to affirm, intervenors urge preliminarily that DOT'S compliance with the Hazardous Materials Transportation Act ("HMTA"),

49 U.S.C. §§1801-1812, is not raised for review by the question presented in appellant's Jurisdictional Statement. They also urge that the courts below did not consider whether DOT violated the National Environmental Policy Act, 42 U.S.C. §§4331-4347 ("NEPA") by failing to prepare an EIS, and that the appellants' failure to cross-appeal from the judgment of the District Court precludes review of that issue. Intervenors' Motion to Dismiss or Affirm, pp. 17-21.

Such arguments are meritless. As for the relevance of HMTA to DOT'S duties under NEPA, the Court of Appeals itself considered the substantive dictates of HMTA in reviewing DOT'S compliance with NEPA. App., p. 21a. Likewise, the District Court, while not explicitly ruling that an EIS was required, found DOT'S finding of no significant environmental impact, the pivotal issue in determining whether an EIS must be prepared, to be inadequately supported and to be arbitrary and an abuse of discretion. App., pp. 111a, 142a. Both the majority and the dissent in the Court of Appeals

recognized that the core issue in the case was whether DOT properly determined that an EIS need not be prepared. App., pp. 23a, 41a. Furthermore, the judgment of the District Court declared that HM-164 was in violation of NEPA (and HMTA) and enjoined, inter alia, its enforcement to the extent it preempts or overrides New York City's ordinance until DOT undertakes consideration of the risks and possible consequences of allowing large quantity shipments of radioactive materials through densely populated areas, and examines alternative, non-highway methods of transport. App., pp. 54a-55a. Since the District Court had granted the City the remedy it had sought, there could be no reason for the appellants to have cross-appealed from a judgment so favorable to them.

Finally, on the merits, both the federal appellees and the intervenors urge that DOT's determination not to prepare as EIS was reasonable, that it took the requisite "hard look" at the consequences of its action, and that accordingly there should be a summary affirmance. However, as

we indicated in our Jurisdictional Statement, DOT's refusal to prepare an EIS violates the very CEQ regulations by which they are bound. J.S., pp. 16-19. Furthermore, whether or not DOT took a hard look at the probabilities of a credible, catalysmic accident, they certainly did not take a hard look at the consequences of such an accident, despite estimates of mortality resulting from an accident in a densely populated area ranging up to over a million fatalities. App., pp. 133a-134a. While we do not wish to reiterate the arguments made in our Jurisdictional Statement, it is submitted that DOT's failure to prepare an EIS, prior to effectuating its regulations governing the transportation of radioactive materials on the nation's roadways, and despite the credible risk of catastrophe, "effectively negates [the requirements of] NEPA". App., p. 52a (dissent of Circuit Judge Oakes).

CONCLUSION

THIS COURT SHOULD DENY THE MOTIONS TO DISMISS OR AFFIRM, AND NOTE PROBABLE JURISDICTION OF THE APPEAL.

February 22, 1984

Respectfully submitted,

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